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No. 153.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

ALBERT H. LADNER, Jr., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, Petitioner,

v.

PHILADELPHIA BARGE COMPANY and NATIONAL SURETY COMPANY.

RESPONDENTS' BRIEF UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WALTER BIDDLE SAUL,
Attorney for Respondents.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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No. 153.

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OCTOBER TERM, 1933.

Albert H. Ladner, Jr., Collector of Internal Revenue for the First Collection District of Pennsylvania, Petitioner,

v.

Philadelphia Barge Company and National Surety Company.

RESPONDENTS' BRIEF UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF QUESTION PRESENTED.

In addition to the question presented by the petitioner there is a further question: Does the failure to show to the court a substantial need for continuing and maintaining the cause in the name of the present collector within six months of the death of the original plaintiff in the present suit abate the present suit?

ARGUMENT.

I. THE PRESENT SUIT HAS ABATED FOR FAILURE TO COMPLY WITH THE ACT OF 1925 WHETHER OR NOT THERE WAS ANY CAUSE OF ACTION AFTER THE ABATEMENT OF THE FIRST SUIT.

In addition to the requirements of the Act of February 13, 1925, c. 229, printed as the appendix to the petition, Rule 19, paragraph 4, of the rules of this court provides as follows:

> "4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

The petitioner has failed to comply with the terms of the act and this rule in that he has never at any stage of this case attempted to show to the District Court or to the Circuit Court of Appeals "that there is a substantial need for * * * continuing and maintaining the cause and obtaining an adjudication of the question involved."

After the abatement of the first suit the present suit was brought in the name of Joseph S. McLaughlin, who was a successor to the collector who brought the first suit. Joseph S. McLaughlin died on June 11, 1932, and instead of complying with the Act of 1925 and the above rule of court, a suggestion of the death of McLaughlin and the substitution of the plaintiff, as his successor, was filed in the District Court. Thereafter proceedings were taken in the name of Albert H. Ladner, the present collector, without any order of the District or Circuit Court.

It is true that the filing of the suggestion would be sufficient under Pennsylvania practice. The petitioner argues that the Conformity Act applies and that hence the suggestion of death and substitution is proper. But the Conformity Act is in force

only to the extent that the State practice does not conflict with other Acts of Congress.

As stated by Mr. Justice Gray in LUXTON v. BRIDGE CO., 147 U. S. 337, 338 (1892),

> "This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress. *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Chateaugay Co., petitioner*, 128 U. S. 544; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202."

In SOUTHERN PACIFIC R. R. v. DENTON, *supra*, the same Justice said,

> "And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. *Ex parte Fisk*, 113 U. S. 713, 721; *Whitford* v. *Clark County*, 119 U. S. 522."

The many other cases which are all to the same effect may be found in note 5 to Title 28, sec. 724 of U. S. Code Ann.

In view of the positive provisions of the abatement act and the mandatory rule of this court, it is submitted that the Pennsylvania State practice is of no moment. A petition for the substitution of Ladner as plaintiff should have been filed accompanied by such averments as would show to the court the necessity for continuing the cause. For failure to comply with the requirements, the action has now abated. (LECRONE v. MCADOO, 253 U. S. 217; UNITED STATES v. CURRAN, 276 U. S. 590.)

II. RIGHT TO SUE SUCCEEDING OFFICER FOR CONTINUANCE OF ILLEGAL ACT IS NO AUTHORITY FOR THE CONTINUANCE OF THIS CASE.

One of the questions argued before the District and Circuit Courts was whether the order of the District Court abating the first suit constituted an abatement of the cause of action or only the writ.

The petitioner argues that, where the successor of an officer who was the *defendant* in a case which has abated, continues the illegal official conduct charged against his predecessor, the right of the plaintiff to bring a suit against the successor has never been doubted (p. 6 of petition). This is unquestionably a correct statement of the law. But petitioner then argues that this rule is authority for the proposition that the failure to substitute a succeeding officer as *plaintiff* does not affect the right to bring a new suit.

An analysis of the reasons for the rule shows clearly its inapplicability to the present case. Where a succeeding officer continues illegal conduct previously charged against his predecessor, the basis of the right of action against him is the new tort or the threat of one. There is a new cause of action which is entirely independent of the cause against the former officer. It is for his own unauthorized illegal conduct that the second official is sued. But in the present case the second suit is upon the same cause of action as the first suit which abated. This cause of action was merged in the judgment that was entered in the first suit and when that judgment was stricken off, there was no longer a cause of action to support a second suit.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be refused.

WALTER BIDDLE SAUL,
Attorney for Respondents.